UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVE SCHONBERG,	)	
	)	Civil Action No. 1:10-cv-02040
Plaintiff,	)	(RWR-JWR-CKK)
	)	
v.	)	THREE-JUDGE COURT
	)	
FEDERAL ELECTION COMMISSION, and	)	
THE UNITED STATES,	)	
	)	
Defendants.	)	
	)	

DEFENDANT UNITED STATES'S REPLY IN SUPPORT OF DEFENDANT'S UNITED STATES'S MOTION TO DISMISS

On April 5, 2011, Plaintiff, Steve Schonberg ("Plaintiff") filed his Opposition ("Pl.'s Opp.") arguing that because of his taxpayer status and his status as a 2010 and 2012 challenger to the incumbent Representative for the House of Representatives ("Members") for the 6th district of Florida ("Rep.FL6"), he has an actual injury, which gives him standing to sue. (Pl.'s Opp. at 3-6). Plaintiff further complains that the misuse of the Members' Representational Allowance ("MRA") by Members, including Rep.FL6 is done without outside oversight, public accountability and little fear of retribution. (Pl.'s Opp. at 3, 6-7). Plaintiff further argues that the MRA provides funds that give Members an illegal source of campaign funds in violation of his equal protection rights under the Fifth Amenment. (Pl.'s Opp. at 8). Plaintiff further argues that earmarks are illegal because they are used by Members to obtain voter support and special favors from the Member's constituency. (Pl.'s Opp. at 4-6). Plaintiff's arguments are without merit.

ARGUMENT

I. Plaintiff Does Not Have an Injury to Confer Standing to Sue[1]

Plaintiff continues to complain that he is injured and and has standing to sue because his constitutional rights have been violated because earmarks and MRA are used by Rep.FL6 as a campaign advantage. (Pl.'s Opp. at 5). Plaintiff's arguments are without merit.

A. Standing as a Taxpayer

Plaintiff, as a taxpayer does not have "an Article III case or controversy" if he does no more than raise a "generally available grievance about government-claiming only harm to his and every citizen's interest in proper application of the Constitution and laws." Lujan v. Defenders of Wildlife, 504 U.S. 560, 573, 112 S.Ct. 2130. Although the minimum constitutional requirements for standing were explained in Lujan, recently and significantly, in Arizona Christian School Tuition Organization v. Winn, 131 S.Ct. 1436 (April 4, 2011), the Supreme Court established that individuals do not generally have standing to challenge governmental spending, either by the state or federal government, solely because they are taxpayers, because "it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm.") (quoting Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 593 (June 27, 2007).

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[1] In Plaintiff's Memorandum in Opposition to Defendant Federal Election Commission's ("FEC") Motion to Dismiss ("Pl.'s FEC Opp.), Plaintiff fails to allege clearly what injuries he is claiming. (Dk. Entry No. 37). Most notably, he contradicts himself regarding whether he is still alleging an injury based upon having less money than his opponent in their electoral contest. In Pl.'s FEC Opp, for example, Plaintiff cites his opponent's ―monetary advantage (pp. 30-31), but Plaintiff also states (p. 37), that his ―claims are not dependent on how much money he has or does not have to spend on his campaign.

B. Standing as a Candidate

With respect to Plaintiff's claim that he has standing as a candidate in the 2010 and 2012 Congressional elections, he still has not alleged an injury that is sufficiently "concrete and particularized" and "actual or imminent" to confer standing under Article III. See Lujan, 504 U.S. at 560, 112 S.Ct. 2130; see also City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (explaining that "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical"); Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997) (holding that a litigant only has standing based on a threatened future injury if she can demonstrate that the injury "is credible and immediate, and not merely abstract or speculative").

Here, Plaintiff complains that in the 2010, he ran for the U.S. House of Representatives, specifically, the 6th congressional district of Florida and he was defeated, but he does not specify the reasons for his defeat. Plaintiff also claims that in 2012, he intends to run again for the U.S. House of Representatives, which is more than a year from now, and more than a year from the filing of his initial complaint, but Plaintiff does not provide any specificity of the harm that has already suffered in anticipation of a run for political office. Indeed, Plaintiff's complaint and his opposition contain no more than the bare allegations that he sought and was defeated in 2010, and that he plans to seek election in 2012, and his speculation that Rep. FL6 is somehow hindering Plaintiff's chances of winning the seat. Pl.'s Opp. Generally.

Here, for example, Plaintiff's allegations do not adequately distinguish the general advantages of incumbency from his particular allegations that the MRA and earmark legislation are

somehow unconstitutional. See generally Pl.'s Second Amended Complaint ("Sec. Am. Compl."). Because Plaintiff has not given the court an adequate allegation to show that any injury Plaintiff may have suffered is directly connected to Rep. FL6's use of the MRA or his support for specific earmark legislation, rather than the general advantages of incumbency and a host of other intangibles that factor into the electorial process. Winpisinger v. Watson, 628 F. 2d 133 (D.C. Cir. 1980) (plaintiffs' inability to influence the election process or to induce support for Senator Kennedy may turn on "a number of factors that are unrelated to defendants' alleged abuses[,]" which would operate to require extreme speculation to establish a relationship between the defendants' alleged conduct, and the plaintiffs' injury).

Moreover, any future injury that Plaintiff may suffer in 2012 is entirely speculative at this point. With respect to Plaintiff's campaign for election in 2012, it is not clear how the Plaintiff's possible future defeat at the polls causes him "imminent" injury. Lujan, at 565, n. 2, 112 S.Ct., at 2138, n. 2. ("[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes that the injury is 'certainly impending.' ").

Therefore, Plaintiff has not made an adequate showing that there is a relationship between his future election success or failure, and Rep.FL6's alleged effect of the MRA and earmarks. Accordingly, Plaintiff's case should be dismissed with prejudice for lack of standing.

II. MRA and Earmarks

Plaintiff continues to complain, but without any support, that the MRA and earmarks provide a monetary advantage to the incumbent, which results in invidious discrimination, for example, "by authorizing incumbents to use federal employees to campaign for them." (Pl.'s Opp. at 8).

First, the allegation that Rep.FL6 misused official funds does not mean that the House rules themselves are flawed or that the MRA is unconstitutional. The latter does not follow from the former. Moreover, the Ethics rules are far from being "devoid of oversight, unregulated by the force of law[,]" as Plaintiff argues in his opposition (Pl.'s Opp. at 9). Indeed, there are sanctions for violations of the Ethics Rules, including censure by the House and/or referral to the Department of Justice for prosecution. See House Ethics Manual, Comm. On Standards of Official Conduct, 110th Congress, 2d Session (2008 Ed.), Chapter 1., General Ethical Standards, Violations of Ethicial Standards, p 3; see generally Joint Comm. on Congressional Operations, House of Representatives Exclusion, Censure, and Expulsion Cases from 1789 to 1973, 93d Cong., 1st Sess. (Comm. Print 1973); Committee Rule 24(e).

Second, Members must regularly certify that all official funds have been properly spent, and a false certification may bring criminal penalties, and the government may recover any amount improperly paid. See e.g. 18 U.S.C. § 1001 (criminal penalty for submitting false statements to the government); see also 31 U.S.C. §§ 3729-3731 (False Claims Act permits treble damages).

Simply put, other than his bald assertions, Plaintiff has provided no colorable allegation that the MRA or earmarks are unconstitutional. Moreover, even if he is also alleging a violation of the Ethics Rules, Plaintiff's complaint should not be addressed to this Court, but rather with the House Ethics Committee, which is in place for that very purpose. In addition, relief for Plaintiff's complaint can and should be sought by Plaintiff at the polls, which is the American democratic system of government.

Finally, Plaintiff has failed to demonstrate that the MRA statute violates his Due Process rights under the Fifth Amendment, because, as Defendant discusses in detail in its opening brief, it

has a legislative purpose to support its Members. Additionally, the MRA is determined by statute, the MRA is not compensation, the MRA is ascertained by law. Thus, Plaintiff's claims fail as a matter of fact and law.

III. Plaintiff's Suit Is Barred By The Doctrine Of Sovereign Immunity.

As the United States argued in its opening brief, there has been no waiver of sovereign immunity authorizing Plaintiff to sue the United States. Defendant also contends that sovereign immunity bars the instant action because Plaintiff has neither established that Rep.FL6 has taken actions outside its statutory powers nor established that he (Plaintiff) has any viable constitutional claim. See Smith v. Katzenbach, 351 F.2d 810, 814 (D.C. Cir. 1965) (recognizing the viability of the government's argument that sovereign immunity bars a claim where the "constitutional contentions are frivolous" and stating that the "doctrine whereby a court denies jurisdiction to entertain a suit upon the basis of a consideration of its merits seems to be an accepted feature of this field of law").

Because Plaintiff can point to no congressional statute waiving sovereign immunity and authorizing this suit against the United States, his complaint should be dismissed. See also Keener, 467 F.2d at 953 (suit for writ of mandamus to compel United States Congress to return to some uniform method of valuation for the United States currency was "frivolous" since, among other things, Congress was protected from suit by sovereign immunity).

IV. Plaintiff's Claim Is Barred By The Political Question Doctrine.

As Defendant argued in its opening brief, to the extent that Plaintiff challenges the procedures by which Congress appropriates money, his complaint is non justiciable under the political question doctrine because a review by a court of the process by which Congress legislates

"would run the risk of intruding upon the respect due coordinate branches of government." Made In The USA Foundation v. United States, 242 F.3d 1300, 1318 (11th Cir. 2001); see Goldwater v. Carter, 444 U.S. 996 (1979) ("Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.") (Powell, J., concurring). The "apparent acquiescence" of the executive branch in the practice of congressional earmarks "further counsels against judicial intervention in the present case." Made In The USA Foundation, 242 F.3d at 1319.

For these reasons, and those stated in Defendant's opening brief, Defendant United States respectfully requests that the Court dismiss Plaintiff's claims against it with prejudice.

Date: April 21, 2011

Respectfully submitted,

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